1963

Howard B. Ericksen v. Robert L. Poulsen : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

HOWARD B. ERICKSEN,
Plaintiff-Appellant,

vs.

ROBERT L. POULSEN,
Defendant-Respondent.

Case No. 9973

APPELLANT'S BRIEF

Appeal from the Judgment of the
First District Court for Cache
Court

Honorable Lewis Jones, Judge

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AUTHORITIES AND CASES CITED

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STATEMENT OF KIND OF CASE

This is an action by the Plaintiff for Breach of Warranty to recover damages or the purchase price paid for a Ponies of America Stallion by the name of "Apple Jack" purchased under the Sales Act of Utah, upon the Complaint of the Plaintiff alleging among other things a Breech of Warranty of fittness for purpose, which Defendant in his Answer denied.

DISPOSITION IN LOWER COURT

The case was tried to the Court, sitting without a jury from a Judgment for Defendant of no cause of action. The Court dismissed Plaintiff's Complaint, Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Judgment, and Judgment in Plaintiff's favor as a matter of law .

STATEMENT OF FACTS

This is an action by plaintiff to recover damages or the purchase price paid for a P. O. A. Stallion by the name of "Apple Jack."

The Trial Court found that the sale to Plaintiff was made on the 29th day of May, 1961, and that Plaintiff paid the sum of $1500 to Defendant for the stallion, and that as a result of the sterlity of the P. O. A. Stallion, Plaintiff incurred $24 veterinarian expenses and $100 as expenses for breeding and caring for the horse. (Trial Court's Findings, paragraph No. 1, Amendment to Findings, dated the 16th day of July, 1963, paragraph 14.)

The findings of the Court (twice amended by the Court) established that both parties to the sale knew prior to the sale that the horse was to be used by Plaintiff for breeding purposes. The horse after the sale was transported to Hamilton, Montana, the residence of the Plaintiff, where it was found, by the Plaintiff, to be incapable of begetting offspring and was unfit for the purposes for which it was purchased by Plaintiff. (Trial Court's Amended Findings, dated the 16th day of July, 1963, Paragraphs No. 10, 11, 12, and 13.)

The Court found that while "Apple Jack" was able to impregnate one mare prior to the sale, that after the sale he was then unable to impregnate Plaintiff's mares. The Court was then unable to make any finding as to whether the animal was in fact infertile at the time of sale. (Trial Court's findings, Paragraph No. 15 as amended on the 16th day of July, 1963.)

From the Findings of Fact the Court concluded in the Court's Conclusions of Law that the Court from the evidence could not predicate the finding of alleged unfitness at the time of the sale of "Apple Jack" to the Plaintiff. The Court further concluded that no rescission was attempted within a reasonable time after Plaintiff was put on notice as to "Apple Jack's" claimed infertility and that Plaintiff made no offer to deliver the stallion in as good or equal condition as it was then received by Plaintiff, and that "Apple Jack's" death was not caused in any way by resaon of the claim of "Apple Jack's" incapability to impregnate mares. By reason thereof, the Court concluded that Plaintiff had no cause of action against the Defendant. (Court's Conclusions of Law, paragraphs 1, 2, 3, and 4, and paragraph No. 5 as amended on the 16th day of July, 1963.)

ARGUMENT

Point 1. The Trial Court erred in its Conclusion of Law No. 5 as found in the Amended Conclusions of Law dated the 16th day of July, 1963.

The Finding of Fact, Paragraph No. 10 as amended on the 16th day of July, 1963, states that Defendant represented the stallion as fit and capable of producing offspring. That at the time the defendant knew it was the intention of Plaintiff to purchase the P. O. A. Stallion for breeding purposes, and that the Plaintiff relied upon the representations, knowledge, and integrity of the Defendant. (Findings No. 11 and 12.)

The Finding of Fact, Paragraph No. 13, was amended on the 16th day of July, 1963, states that the stallion was incapable of begetting offspring and was unfit for the purpose for which it was purchased.

Taking these Findings of Fact, the Court concluded in its Conclusions of Law, that there was not sufficient evidence presented by the Plaintiff to find the unfitness of the stallion as of the time of sale.

Other Courts have not had the same troubles. See Eden vs. Vloedman, 214 P 2d, 930, where the Oklahoma Supreme Court, in 1949, held that a seller of cows warranted that they were fit for breeding purposes, and immediately after the sale they began to calf prematurely because they were infected with banks disease, the warranty was breached even if the defect was not fully developed at the time of sale, the Court allowing in evidence the statement of a veterinary eight months after the sale of said cattle that he examined ten head of said cattle,

picked at random and found them affected with bangs disease.

In Mousel vs. Widker, 69 NW 2d, 783, the case appealed to the Supreme Court of North Dakota in 1955, where the Trial Court's failure to give certain instructions on an implied warranty, the North Dakota Supreme Court stated, citing other cases, that where an animal is purchased for breeding purposes and the seller as well as the buyer knew that the animal was purchased for breeding purposes, and the purchaser introduced evidence showing sterlity, the general rule pronounced by the Courts is that in such sales there is an implied warranty available as a basis for action, that the thing purchased is reasonably suitable for the purpose for which it is to be used. In the case of Mousel vs. Widker, the Court cited the case of *Peterson vs. Dreher*, 194 *NW*. 53.

46 Am. Jur., page 573, states that testimony of third persons who examine the horse immediately after its sale and while in buyer's possession is admissable to prove unsoundness at the time of sale, absent any evidence introduced that would tend to show that purchaser was in some manner responsible for the sterlity or infertility as the case may be.

In the case of Studebaker Brothers Co., vs. Anderson, 50 Ut. 319, 67 P. 663, this Court held that the unfitness of an automobile was proved by evidence showing that the automobile was not fit for the purpose when

it was in the possession of the purchaser. The case does not make note nor consider the question of whether or not the car was fit at the time of the sale, but bases its decision upon the fitness of the automobile while in the possession of the purchaser . . . implying that fitness at the instant the sale takes place is not a necessary requisite to the maintenance of the action.

(See further in this regard 53 A. L. R. 2d, 844; 77 C. J. S. 1188; and Balch vs. Newberry, 252 P. 2d, 153, Oklamoho, 1953.)

As a further argument, the Trial Court did not find that there was a change in the physical condition of the stallion after the sale and before arrival in Hamilton, Montana, where it was found to be unfit by the Plaintiff. Absence of such a finding would predicate only one finding: That the stallion must have been in the same condition at the time of the sale, notwithstanding Finding of Fact No. 5, and the nebulous No. 9, which were made before Plaintiff's motion to amend Findings of Fact and Conclusions of Law and should be regarded as amended as they are inconsistent with the later Findings of Fact, Paragraph 13, and the Judge's Memorandum Decision.

Point 2. That the Trial Court erred in making Conclusions of Law, No. 4, and the Judgment.

The Conclusions of Law and the Findings of Fact are not consistent. The Judgment, although supported

by the Conclusions of Law, is not supported by the Findings of Fact. In the case of Mason vs. Mason, 160 P. 2d, 730, 108, Utah, 428, this Court said as follows:

> "It is fundamental that the Conclusions of Law must be predicated and find their support in the Findings of Fact, and the Judgment must follow the conclusions of Law, and if the Conclusions of Law are at variance with the findings, the Supreme Court will order the lower court to set aside its erroneous conclusions and substitute correct ones therefor."

For further cases see: Parrot Brothers vs. Ogden City, 50 Utah, 512, 167 P. 807; and again we find Brittian vs Gorman, 42 Utah, 586, 133 P. 370, where this Court said: That Conclusions of Law must be based upon the facts and must be considered with the facts, and in a like fashion the Court's decree must rest upon legal conclusions and be consistent with them. A judgment, if in conformity with the findings, will not be distributed; and of course, the converse is true. A judgment not in conformity with the findings cannot be permitted to stand.

In the last above cited case, the Judgment was vacated and set aside and the case remanded to the District Court with instructions to make and enter additional findings, if necessary, conclusions of law supported by the findings, and a decree in harmony with the opinion.

The Plaintiff-Appellant cites the Mason case supra,

the Parrot Brothers Company case supra, and the Brittian case supra, as authority for error in that the judgment in the case at bar denies Plaintiff relief, yet the Findings of Fact and the Memorandum of the Judge clearly states that the Court finds the facts and makes the legal conclusions in accordance with Plaintiff's theory of the case, except for the fact that the Court found Plaintiff delayed in attempting to rescind the contract.

The second reason, wherein Plaintiff-Appellant alleges that the Trial Court erred in making is Conclusions of Law, is the fact that the Court denied Plaintiff recovery as found in the Judgment and dismissed Plaintiff's complaint, apparently predicating its decision upon the fact that the Plaintiff did not attempt rescission upon a reasonable time after Plaintiff was put on notice of "Apple Jack's" infertility. The question is one dealing with election of remedies.

In the case of Balch vs. Newberry, cited supra, upon the filing of a complaint by the Plaintiff, the Defendant filed a motion to elect demanding that the Plaintiff make his election to sue for damages or to sue for the rescission of the contract.

In the case at bar, Plaintiff's complaint prays for judgment against the Defendant in the amount of $1500, being the purchase price of the horse, together with various costs expended by Plaintiff. The second para-

graph is a prayer for rescission of the contract of sale for Breech of Warranty and for damages stated in the first paragraph. Plaintiff's prayer is double-barreled in the respect that it first asks for damages and alternatively asks for rescission. The Defendant did not, as in the case of Balch vs. Newberry, supra, make or file any motion to compel Plaintiff to elect a remedy. At no time during the trial of the matter did the Defendant move for an election. The Trial Court apparently based its decision upon rescission and did not consider the first paragraph of Plaintiff's prayer for relief based upon damages for Breech of Warranty. In this regard, the Trial Court erred. Section 60-5-7, Utah Code Annotated, 1953, states that when the buyer has claimed and has been granted a remedy in any one of these ways, no other remedy is available. At no time did the Defendant request Plaintiff to elect a remedy, nor was an election made other than that found in the pleadings. The judgment of the Court does not grant a remedy as it was made upon the assumption that Plaintiff had elected rescission when in fact, Plaintiff's first prayer for relief contains a claim for damages. In the case of Kramer vs. K. O. Lee and Sons, 237 NW 166, where the North Dakota Supreme Court held that: "Though Plaintiff failed to rescind within time, they are not necessarily shut off from all remedy. It is only when they have claimed and have been granted the remedy of recission under the provisions of

Section 5591A (our Section 60-5-7, Sub 2 ,Utah Code Annotated, 1953) that this method is exclusive."

Quoting other cases:

> "It is true that the complaint is based upon rescission and asks for the return of the purchase price, but the counterclaim is in itself an action brought by the Defendants against Plaintiffs and the reply must be treated as an answer. In the reply the Plaintiff realleges the allegations that their signatures were obtained by fraud and deceit, and they asked for relief demanded in the complaint; that is, the return of the purchase price paid, together with the re-delivery of the notes and mortgages. Having failed to show timely recission, Plaintiffs are relegated to their right to damages as an offset to suit on the notes and mortagages."

So it is in the case that the Plaintiff, assuming that he is barred from an action or recission, is not barred from bringing an action in damages. See further 78 C. J. S. 144 where it is stated:

> "It has been held that the buyer must elect between affirmance and rescission of the contract, and that he is bound by his election. But it has been held that an unsuccessful suit for the purchase price paid based in a rescission of the contract of sale does not preclude a recovery of damages, and that a buyer who has waived his right to rescind may sue for damages, and that a buyer who has waived his claim for damages may rescind and reclaim the consideration paid. A buyer who elects to affirm the contract and sue for damages has the entire period allowed by the

> Statute of Limitations in which to institute his action, but a buyer who elects to rescind must act within a reasonable time."

It is, therefore, realleged that the Trial Court's action in dismissing plaintiff's complaint was untimely and that the Trial Court, although finding Plaintiff delayed too long to commence an action for rescission was entitled to receive damages inasmuch as Plaintiff never claimed and had never been granted the remedy of rescission under the provisions of Section 60-5-7, Sub 2, Utah Code Annotated, 1953.

The Utah Supreme Court, in the case of Studebaker Brothers Company, vs. Anderson, 50 Utah, 319 P. 663, 1916, held that the Defendant had the remedy of rescission of the contract but that was not the only remedy the Defendants could invoke as the vendee had a right to rescind the contract and recover back the purchase price, or he may retain the article and hold the vendor for his damages. The Court cited 28 Cyc. 44.

POINT 3. That the Trial Court erred in making Conclusion of Law No. 3.

The firs two points considered in this brief consider the errors of the Trial Court for failing to grant relief to the Plaintiff on grounds not considered by that Court or grounds inconsistently decided by that Court. This Point concerns itself with the proposition that the Trial Court erred in making the decision as found in the Judg-

ment. For this argument only the record of the case is referred to and only that portion of the record dealing with the conversations between Plaintiff and his wife and the Defendant occuring after the sale. The findings of the Court support the other facts considered. The conclusion states that Plaintiff did not attempt to rescind the contract within a reasonable time, yet the testimony indicates the Defendant encouraged the Plaintiff to keep the stallion, thereby waiving the provision for rescission after a reasonable time.

Mrs. Erickson, the wife of the Plaintiff, stated that soon after the purchase of the horse and upon discovery of his infertility, that during the conversation over the telephone the defendant said, "Just wait awhile and give the horse a chance to mature since he was just a young horse." That Mrs. Ericksen replied that she agreed to take the advice of the Defendant. Thereafter, certain letters wree written by the Plaintiff notifying Defendant of the infertility of the stallion. (Transcript page 54, lines 12-18, Transcript page 255.)

Mr. Mereness, a witness for Defendant, testified that he, under the direction of the Defendant, took another stallion to the Plaintiff's ranch for breeding purposes. (Transcript page 193 and Transcript page 205.)

Doctor Poulsen admitted the fact of the telephone call, and stated in his testimony that with time the horse

would get maturity and breed. (Transcript page 218, line 15.)

It would appear from the record that there is uncontradicted evidence of notification by Plaintiff to Defendant soon after the sale on May 29, 1961, and that at Defendant's request and advice Plaintiff retained the animal, which subsequently died from causes apart from his infertility. There is little doubt from the letters in evidence as to the question of attempted rescission after the death of the horse.

Section 60-5-7 (5) states that:

> "Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee . . ."

Sub-paragraph 3 of the same action states that where the goods have been delivered the buyer cannot rescind the contract if he fails to *notify* the seller within a reasonoble time of his election to rescind, or to *offer* to return the goods in substantially the same condition. These sub sections state that only notification and an offer are requisites and not the filing of complaints claiming rescission and physical delivery of the property to the door of the seller. The evidence shows that there was notification and that Defendant requested Plaintiff to keep the horse "awhile" and now Defendant main-

tains that Plaintiff waited too long. The Trial Court erred in holding that on unreasonable time had passed.

CONCLUSION

In conclusion, it is urged that the decision of the Lower Court be reversed. Directions to enter judgment in favor of Plaintiff as prayed for in his complaint, firstly for damages and secondly and alternatively for rescission of the contract.

By inference, the Trial Court has barred Plaintiff's recovery by way of damages and specifically barred Plaintiff's recovery by way of rescission for the Breech of Warranty which was error. The Appellant herein does not claim both remidies, and realizes that only one remedy may be granted. Therefore, Plaintiff asserts to this Honorable Court his right for damages as set forth in the first paragraph of Plaintiff's prayer, and in the alternative for rescission as set forth in the second paragraph of Plaintiff's prayer for relief.

As a concluding remark, Plaintiff cites to the Court the memadandum decision of the Judge, upon which the original Findings of Fact should have been predicated, which states as follows:

> "That Plaintiff cannot recover in this action because he delayed too long after ascertaining that "Apple Jack" could not impregnate the mares before he attempted to rescind."

Again in the memorandum it is said:

> "Except for the foregoing, the Court finds facts and makes legal conclusions in accordance with Plaintiff's theory of the case. Findings of Fact, Conclusions and a Judgment dismissing the action may be prepared because rescission was not attempted within a reasonable time after Plaintiff was put on notice as to "Apple Jack's" infertility."

The thinking of the Trial Court was with the Plaintiff and the Findings of Fact as amended reaffirm this fact. Cases need not be cited wherein it is stated that the Supreme Court will not alter the findings of the Trial Court if there is reasonable evidence to support the findings. Plaintiff-Appellant does not in any manner contest the findings, but reaffrms to this Court as a matter of law the Trial Court erred in making its conclusions from the Findings.

Respectfully submitted,
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